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Supreme Court, U.S.
FILED
APR 5 1996
CLERK

No. 95-1249

In the Supreme Court of the United States

OCTOBER TERM, 1995

LAWTON M. CHILES, JR., GOVERNOR OF FLORIDA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether the federal government, in its conduct of immigration policy, has violated a judicially enforceable duty to protect petitioners from "invasion" or to guarantee Florida a "Republican Form of Government" within the meaning of Article IV, Section 4 of the United States Constitution.

2. Whether federal immigration policy, coupled with Florida's constitutional obligation to provide education to the children of illegal immigrants on the same terms that apply to other residents, its provision of emergency medical care to illegal immigrants, and its enforcement of state criminal laws against illegal immigrants, violates the Tenth Amendment.

3. Whether petitioners have stated a judicially cognizable claim for violation of 8 U.S.C. 1103(a), which broadly delegates responsibility to the Attorney General to "control and guard the boundaries and borders of the United States against the illegal entry of aliens."

4. Whether petitioners' request for monetary relief is barred by the sovereign immunity of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 69 F.3d 1094. The opinion of the district court (Pet. App. B1-B24) is reported at 874 F. Supp. 1334.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1995. The petition for a writ of certiorari was filed on February 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners—Lawton M. Chiles, Jr., Governor of Florida; the State of Florida; the Dade County Public Health Trust Division; and the School Board of Dade County—seek review of a decision of the court of appeals affirming the district court's dismissal of their complaint against the United States and several federal officials. Petitioners' complaint in this case alleged that the United States had violated various constitutional and statutory provisions by failing to halt the entry of illegal immigrants into Florida. Petitioners sought injunctive, monetary, and declaratory relief. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the court of appeals affirmed.

1. Congress has vested primary authority for enforcement of the immigration laws in the Attorney General. Responsibility for many enforcement functions has, in turn, been delegated to the Commissioner of the Immigration and Naturalization Service (INS). See 8 U.S.C. 1103; 8 C.F.R. 2.1, 100.2(a); 28 C.F.R. 0.105(a). Aliens seeking to enter the United States are required to present themselves to INS officials at designated ports of entry, where they must establish their eligibility for admission into the country. 8 U.S.C. 1225; 8 C.F.R. 100.4, 235.1. Entry into the United States by an alien other than in the manner authorized by statute is a crime and a ground for deportation. 8 U.S.C. 1251, 1252, 1325.

For fiscal year 1995, Congress appropriated more than $800 million for INS's enforcement operating expenses. *Budget of the United States Government, Fiscal Year 1996*, Budget Appendix, at 646 (1996 Budget App.). More than 5,000 INS employees have

been assigned to the Border Patrol, at an annual cost estimated to exceed $400 million. *INS Fact Book: Summary of Recent Immigration Data* 34-36 (August 1995) (*INS Fact Book*). In 1994, the INS inspected more than 444 million persons; the Border Patrol apprehended more than one million deportable aliens; and close to 900,000 deportable aliens were apprehended at inspection points. 1996 Budget App. at 647. More than 1.2 million inadmissible aliens agreed to return to their homelands in 1993; INS expelled approximately 43,000 others through adjudicative proceedings. *INS Fact Book* at 27. Federal law also imposes a panoply of civil and criminal sanctions designed to enhance immigration control. For example, persons illegally bringing an alien into the United States are subject to imprisonment and a criminal fine, 8 U.S.C. 1324, and employers failing to check an alien employee's documents upon hire are subject to a civil penalty, 8 U.S.C. 1324a.

2. Illegal immigration is a subject of longstanding and continuing concern to both Congress and the Executive Branch. Congress enacted comprehensive reforms in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, which also authorized an additional $800 million in funding for the following two years for border patrol and inspection activities. IRCA § 111, 100 Stat. 3381. More recently, in the Justice Department's appropriations measure for fiscal year 1995, Congress included an appropriation for $130 million for the State Criminal Alien Assistance Program, see Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1778, a program that authorizes grants to the States to help

defray the costs of incarcerating illegal immigrants. See 8 U.S.C. 1365(a). Despite the massive efforts undertaken to control illegal immigration, however, it is undisputed that large numbers of illegal immigrants successfully elude the federal government's enforcement efforts each year.

3. a. Petitioners filed suit in the United States District Court for the Southern District of Florida (Miami Division), alleging that the United States had violated various constitutional and statutory provisions in the conduct of federal immigration policy. Count I concerned Florida's claim for payments under the Immigration Emergency Fund, see 8 U.S.C. 1101, a fund administered by the Attorney General. Pet. App. D27-D29. In Count II, petitioners alleged that the Attorney General had abdicated her responsibilities under 8 U.S.C. 1103(a) "to control and guard the boundaries and borders of the United States against the illegal entry of aliens." Pet. App. D30-D32. In Count III, petitioners alleged that Congress had acted unlawfully in failing to extend benefits to illegal aliens under the Medicaid and AFDC programs. *Id.* at D33-D35. In Count IV, petitioners alleged that federal immigration policy causes an influx of illegal immigrants into Florida in violation of the U.S. Constitution, Article IV, Section 4, which provides that the United States "shall protect each [State] against Invasion." They further alleged that federal immigration policy has resulted in a violation of Article IV, Section 4's requirement that the United States shall "guarantee to every State in this Union a Republican Form of Government." Finally, petitioners contended that federal immigration policy, coupled with Florida's constitutional obligation to provide education to the children of illegal immi-

grants and its decision to provide certain social, health, and correctional services to illegal immigrants, violates the Tenth Amendment. Pet. App. D36-D41.

b. The district court dismissed Count I of the complaint, holding that petitioners' claim was not yet ripe because Florida had not applied for relief pursuant to newly promulgated rules governing the Emergency Fund. Pet. App. B7-B8. With respect to Count II, the district court held that the Attorney General's decisions regarding the institution of deportation proceedings are "presumptively immune from judicial review," *id.* at B13, and that nothing in the governing statute served to rebut that presumption, *id.* at B14. In dismissing Count III, the court observed that any alteration of the incentives for illegal immigration could have serious consequences for this country's naturalization scheme, as well as for its relationships with foreign countries. *Id.* at B17. The court also noted that "[t]he State of Florida chose to participate in both Medicaid and AFDC" and therefore "must abide by the conditions of the programs, including the lack of funding for illegal aliens." *Id.* at B18. Finally, the district court dismissed Count IV of the complaint. *Id.* at B19-B23. Adjudication of petitioners' claims, the court recognized, would require a far-ranging review of federal immigration policy, including an assessment of the likely cost and effectiveness of alternative enforcement methods. In the absence of criteria enabling it to make such judgments, the court concluded that petitioners' claims raised non-justiciable political questions. *Id.* at B22-B23.

c. The court of appeals affirmed. Pet. App. A1-A5. The court held that petitioners' statutory claim was

unreviewable, explaining that "Congress intended whether the Attorney General is adequately guarding the borders of the United States to be 'committed to agency discretion by law,'" *id.* at A3 (quoting 5 U.S.C. 701(a)), and that 8 U.S.C. 1251(a) "expressly gives the Attorney General discretion whether to deport a particular alien," Pet. App. A3. The court also held that the district court had properly dismissed Count III, regarding Medicaid and AFDC limits, "because no specific constitutional limit on the spending power ha[d] been exceeded by the reimbursement policies of AFDC and Medicaid." *Id.* at A4. Finally, the court affirmed the dismissal of Count IV, holding that petitioners' Invasion and Guarantee Clause claims presented non-justiciable political questions, *id.* at A4-A5, and that the State's provision of various services to illegal aliens was "not the product of federal coercion of the kind which violates the Tenth Amendment," *id.* at A5.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals.[1] Further review is not warranted.

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[1] The court of appeals' decision is also consistent with the rulings of all the district courts that have considered these or similar questions. See *California* v. *United States*, No. 94-0674-K (S.D. Cal. Mar. 3, 1995), appeal pending, No. 95-55490 (9th Cir.); *Arizona* v. *United States*, No. 94-0866 PHX SMM (D. Ariz. Apr. 18, 1995), appeal pending, No. 95-15980 (9th Cir.); *Padavan* v. *United States*, No. 94-CV-1341 TJM DNH (N.D.N.Y. Apr. 18, 1995), appeal pending, No. 95-6156 (2d Cir.); *New Jersey* v. *United States*, No. 94-3471(GEB) (D.N.J. Aug. 2, 1995), appeal pending, No. 95-5685 (3d Cir); *Texas* v.

1. a. Petitioners contend that by failing to halt the influx of illegal immigrants into Florida, the federal government has breached its constitutional duty to "protect each [State] against Invasion." U.S. Const. Art. IV, § 4. As both the district court and the court of appeals recognized, that claim presents a non-justiciable political question. Pet. App. A4-A5, B20-B22; see generally *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). Admission of aliens into the United States and control over the borders are matters firmly entrusted to the political branches. See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). Similarly, protection of the United States from illegal immigration implicates matters of foreign policy and defense into which courts will intrude only with the greatest reluctance. See, *e.g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 114 S. Ct. 2268, 2284-2285 (1994).

The Constitution provides no "judicially discoverable and manageable standards for resolving" petitioners' claim. *Baker* v. *Carr*, 369 U.S. at 217. The Constitution provides no criteria either for determining when a peacetime influx of immigrants has risen to the level of an "invasion," or for assessing the adequacy of the federal government's response to such a threat. As the district court explained, adjudication of petitioners' claims would require a court to "review the * * * entire enforcement of Federal immigration laws including the enforcement methods used and their effectiveness, determine the reasonableness of budget allocations, determine whether more resources are available and, if so, decide how those additional resources should be

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United States, No. B-94-228 (S.D. Tex. Aug. 7, 1995), appeal pending, No. 95-40721 (5th Cir.).

allocated." Pet. App. B22. The court noted that it was "unable to identify satisfactory criteria for making these determinations," *ibid.*, and correctly concluded that such decisions "should be left to the Legislative and Executive branches of government," *id.* at B23. Accord *Barber* v. *Hawaii*, 42 F.3d 1185, 1198-1199 (9th Cir. 1994) (assertion that a State has been invaded within the meaning of Art. IV, § 4 presents "a non-justiciable political question").

b. For essentially the same reasons, the courts below were correct in dismissing petitioners' Guarantee Clause claim. In *New York* v. *United States*, 505 U.S. 144, 184 (1992), this Court observed that "[i]n most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." Although the Court in *New York* suggested that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," it refrained from "resolv[ing] this difficult question," *id.* at 185, and cast no doubt on prior decisions holding Guarantee Clause claims to be non-justiciable.

As the courts below held, petitioners' Guarantee Clause claim presents a non-justiciable political question. There is no standard that would enable a court to determine "when the migration, as well as the costs associated with such migration, reaches the point at which it invades the State of Florida's state sovereignty." Pet. App. B22; see, *e.g.*, *Lincoln* v. *Vigil*, 113 S. Ct. 2024 (1993). Because no judicially manageable standards are available to guide such an inquiry, petitioners' claim is not subject to judicial review. See Pet. App. A4.

Even if petitioners' claim were deemed justiciable, moreover, it is lacking in merit. In *New York* v. *United States*, this Court assumed, *arguendo*, that "the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute." 505 U.S. at 186. It rejected the State's claim on the merits, however, because the challenged statutory provisions "d[id] not pose any realistic risk of altering the form or the method of functioning of New York's government." *Ibid.* The Court observed that the statute in question, which required that States provide for the disposal of certain wastes generated within their borders, offered the States "a legitimate choice rather than issuing an unavoidable command." *Id.* at 185. The statute did not violate the Guarantee Clause because the States "retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate." *Ibid.*

Similarly here, petitioners have failed to establish that the Florida legislature is unable to set its own agenda or that state officials are no longer accountable to the electorate. Petitioners identify no federal legislation that requires Florida to take any particular action with respect to illegal immigrants. The State's obligation to enforce its criminal laws against illegal immigrants stems from ~~the~~ its own laws, not from any federal command. The requirement imposed by the Fourteenth Amendment that States make primary and secondary education available to the children of illegal immigrants on the same terms that apply to other residents, see *Plyler* v. *Doe*, 457 U.S. 202, 230 (1982), cannot constitute a violation of the Guarantee Clause. And while federal law requires Florida to provide emergency medical care to illegal

immigrants, that obligation is the consequence of the State's voluntary decision to participate in the Medicaid program, not the result of any federal command. See *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990).[2]

2. Petitioners' Tenth Amendment claim is similarly without merit. Under this Court's Tenth Amendment jurisprudence, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York* v. *United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). See also *United States* v. *Lopez*, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring) (*New York* v. *United States* involved "a formal command from the National Government directing the State to enact a certain policy"). Petitioners, however, identify no federal directive to the States regarding the treatment of illegal aliens, much less a directive that would commandeer the State's legislative or policy-making apparatus. The federal immigration policies at issue in this case do not require petitioners to enact or enforce a federal regulatory program. As the court of appeals held, "Florida's provision of benefits to illegal aliens is not the product of federal coercion of the kind which violates the Tenth Amendment." Pet. App. A5.

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[2] States choosing to participate in the Medicaid program are reimbursed with federal funds for a percentage of their costs in providing medical services to the needy. See 42 U.S.C. 1396 *et seq.* A State that wishes to receive Medicaid funds must provide emergency (but not non-emergency) medical services to illegal aliens. 42 C.F.R. 440.255(c).

Florida's expenditure of funds to incarcerate illegal immigrants convicted of state felonies does not establish a Tenth Amendment violation. The Tenth Amendment is implicated when the federal government requires a State to take action; no Tenth Amendment concern arises when the federal government leaves a State free to exercise its own sovereignty and implement its own legislative and policy choices. Nor can the Tenth Amendment be violated by the requirement that Florida make public primary and secondary education available to the children of illegal immigrants on the same terms that apply to other residents. As noted above, that requirement is imposed directly by the Fourteenth Amendment. See *Plyler* v. *Doe*, *supra*. The Tenth Amendment does not insulate States from obligations imposed by other constitutional provisions. See *Puerto Rico* v. *Branstad*, 483 U.S. 219, 228 (1987) (when a duty "is directly imposed upon the States by the Constitution itself, there can be no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment."). The Tenth Amendment precludes the federal government from usurping powers reserved to the States. It does not impose an affirmative duty on the federal government to defray the costs of obligations imposed on the States directly by the Constitution.

Petitioners contend that the federal government has violated the Tenth Amendment by requiring them, through their participation in the Medicaid program, to provide emergency care to illegal immigrants. As noted above, however, Medicaid is a voluntary program in which States may decline to participate. Federal actions that "encourage" or

"provide incentives" for States to adopt certain policies do not violate the Tenth Amendment. See *New York* v. *United States*, 505 U.S. at 174-176. In exercising its powers under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, Congress may "attach conditions on the receipt of federal funds." *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Although those conditions "may influence a State's legislative choices," such influence does not violate the Tenth Amendment. *New York*, 505 U.S. at 167. "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Dole*, 483 U.S. at 211 (quoting *Stewart Mach. Co.* v. *Davis*, 301 U.S. 548, 589-590 (1937)). Florida has voluntarily elected to participate in the Medicaid program, presumably concluding that its benefits outweigh its costs; it may not evade those costs by characterizing them as the product of unlawful coercion.[3]

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[3] Petitioners allude in passing (Pet. 12) to the purported "absence of political mechanisms or incentives by which the underlying legal and constitutional deficiencies might be righted." This Court has held, however, that state interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). Although *Garcia* left open the possibility that "extraordinary defects" in the political process could render congressional regulation invalid, see *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988), petitioners have not alleged any such defect. They have not been "deprived of any right to participate in the national political process * * * [nor have they been] singled out in a way that left [them] politically isolated and powerless." *Id.* at 513. Indeed, recent legislation provides a mechanism whereby States can obtain compensation for the costs of incarcerating undocumented aliens convicted of certain crimes.

3. In addition to their constitutional claims, petitioners contend that the Attorney General and the INS Commissioner have breached a non-discretionary statutory obligation to guard and control the borders of the United States. They rely (see Pet. 25) on 8 U.S.C. 1103(a), which states that the Attorney General "shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens." As the courts below held, that claim is not subject to judicial resolution. Pet. App. A3, B12-B14.

The Administrative Procedure Act (APA) precludes judicial review of matters "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Judicial review is precluded "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). Decisions not to take enforcement action "should be presumed immune from judicial review." *Id.* at 832.

As the courts below noted, this case, like *Chaney*, involves actions and decisions that are presumptively unreviewable. Pet. App. A3, B12-B14. Both the formulation of immigration policy generally, and the decision whether to seek to deport a particular alien, "require[] a complicated balancing of factors which are peculiarly within the Attorney General's expertise." Pet. App. B13. The governing statute provides no standard by which a court could determine whether the Attorney General has adequately controlled immigration into Florida, or whether resources should be directed to that problem at the

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See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20301, 108 Stat. 1823.

expense of the other obligations of the federal government.[4] To the contrary, Section 1103(a) provides that the Attorney General shall exercise her statutory responsibilities in such manner "as to [her] shall appear necessary and proper."

Chaney left open the possibility that an agency's non-enforcement decision might be reviewable "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc)). Although petitioners allege (Pet. 25) that such abdication has occurred, they offer no more than conclusory assertions that are legally insufficient to support their claim. See, *e.g.*, *Neitzke* v. *Williams*, 490 U.S. 319, 326 (1989). Indeed, the federal government's extensive efforts to enforce the immigration laws demonstrate that there has been no abdication of federal responsibility. The federal government expends more than a billion dollars annually in its efforts to address the problem of illegal immigration. More than one million immigrants annually are apprehended and returned to their homelands, either voluntarily or through the administrative and judicial process. Stripped of hyperbole, petitioners' argument is simply that the federal government should do something more or different. Petitioners have not established any legal entitle-

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[4] The legislative history of Section 1103(a) indicates that it simply delineates the respective functions of the Attorney General and the Secretary of State, who also has responsibilities in this area, including the issuance of passports and visas. See H. R. Rep. No. 1365, 82d Cong., 2d Sess. 35 (1952).

ment to relief from the courts on the basis of the Attorney General's conduct of her office.

4. Finally, petitioners contend (Pet. 27-30) that the Court should grant certiorari to consider questions concerning appropriate relief. Because the courts below dismissed the suit for failure to state a claim, they did not consider what remedies would have been appropriate if petitioners' action had been successful. The remedial question presented by the petition is therefore unsuitable for this Court's resolution.

Even if petitioners had prevailed on the merits, however, their claims for monetary relief would be barred by the sovereign immunity of the United States. It is well settled that suits against the federal treasury are barred unless Congress has expressly waived sovereign immunity. *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983); *United States* v. *Testan*, 424 U.S. 392, 400 (1976). Petitioners rely (Pet. 28) on the waiver of sovereign immunity contained in the APA, 5 U.S.C. 702. Section 702, however, applies only to actions "seeking relief other than money damages." Although the equitable authority conferred by Section 702 may in some instances encompass monetary relief, see *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), no such relief would be available here. *Bowen* involved a challenge to a federal administrative ruling that disallowed a State's request for federal payments allegedly due it under the Medicaid statute. See 487 U.S. at 886-887. The Court construed Section 702 as incorporating the traditional distinction between money damages and "specific relief," as well as the principle that specific relief may include "the recovery of specific property or monies." 487 U.S. at 893 (quoting *Larson* v. *Domestic & Foreign Com-*

merce Corp., 337 U.S. 682, 688 (1949)) (emphasis omitted). As the Court explained, "[d]amages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." 487 U.S. at 895 (internal quotation marks omitted).

In *Bowen*, the monies sought were properly regarded as specific relief because the Medicaid statute mandated the payment of money under specified circumstances. Thus, the State's APA action was "a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900. Here, by contrast, petitioners do not seek to enforce a statutory entitlement to receive money from the federal government. Rather, they seek a judicially-created mandate for payments that were never authorized by Congress. Petitioners' claims fail because "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)). See also *DIA Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1266-1267 (3d Cir. 1994); *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994). Cf. *Marshall Leasing, Inc.* v. *United States*, 893 F.2d 1096, 1098-1100 (9th Cir. 1990) (allowing action for return of a seized automobile to proceed under Section 702 but holding that the plaintiff would be required to drop his alternative claim for monetary compensation for the car's value). Section 702 permits only specific monetary relief, and does not authorize the courts to reallocate the federal budget.

Nor can petitioners advance their argument by styling their claim (see Pet. 28) as one for "restitu-

tion." Cf. *Northern Cheyenne Tribe* v. *Lujan*, 804 F. Supp. 1281, 1287-1288 (D. Mont. 1991). The essence of a "restitution" claim is that it is based not simply on proof of loss to the plaintiff, but on gain to the defendant, which the latter is ordered to "restore." See Dan B. Dobbs, *Handbook on the Law of Remedies* 222-223 (1973). Petitioners, however, do not seek to recover payments made to the federal government. Any payment made to the petitioners by the United States to compensate for payments to third parties could not be characterized as restitution. Rather, it would be a form of compensatory damages outside the scope of Section 702.[5]

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[5] No statute other than the APA could plausibly be thought to provide a waiver of sovereign immunity for money damages in this case. Congress has enacted no general waiver of immunity for money claims based on alleged violations of constitutional rights. *Testan*, 424 U.S. at 401. The Tucker Act is inapplicable here, since petitioners can point to no contract with the United States, do not "seek the return of money paid * * * to the Government," and can point to no "federal statute [that] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). In any event, because petitioners seek well over $10,000, any Tucker Act suit could have been brought only in the Court of Federal Claims. See 28 U.S.C. 1346.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996